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International Union of Operating Engineers, Local 150, AFL-CIO and International Brotherhood of Teamsters, Local 703 and Paul F. Pedersen Company d/b/a Pedersen Company and United Union of Roofers, Waterproofers and Allied Workers, Local No. 11. Cases 13-CD-802 and 13-CD-803

November 27, 2009

#### DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Paul F. Pedersen Company d/b/a Pedersen Company (the Employer) filed charges on July 6, 2009, alleging that the Respondents, International Union of Operating Engineers, Local 150 (Operating Engineers), and International Brotherhood of Teamsters, Local 703 (Teamsters), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to continue to assign certain work to employees represented by Operating Engineers and Teamsters rather than to employees represented by the United Union of Roofers, Waterproofers and Allied Workers, Local No. 11 (Roofers). The hearing was held on July 30 and 31 before Hearing Officer Cathy Brodsky. Thereafter, Operating Engineers and Teamsters, jointly, the Employer, and Roofers filed posthearing briefs.

The National Labor Relations Board<sup>2</sup> affirms the hearing officer's rulings, finding them free from prejudicial

error. On the entire record, we make the following findings.

#### I. JURISDICTION

The parties stipulated that the Employer is an Illinois corporation engaged in commercial landscape construction and maintenance, and that, during the past calendar year, the Employer purchased and received goods and materials valued in excess of \$50,000 indirectly from points located outside the State of Illinois. Accordingly, the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated, and we find, that Operating Engineers, Teamsters, and Roofers are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE DISPUTE

## A. Background and Facts of the Dispute

The Employer has been engaged in commercial landscape construction and maintenance in the Greater Chicagoland area since 1994. On June 8, 2004, the Board certified Operating Engineers and Teamsters as the joint representatives of the employees in a multiemployer bargaining unit comprised of constituent members of the Illinois Landscape Contractors Bargaining Association (ILCBA). In this unit are the Employer's landscape construction employees, including lead plantsmen, plantsmen, landscape helpers, and installers. As an ILCBA member, the Employer is signatory to the plantsmen agreement<sup>3</sup> with both unions and the operators agreement<sup>4</sup> with operating engineers. The Employer has never had a collective-bargaining relationship with Roofers.

The Employer has subcontracting agreements with general contractor F.H. Paschen, SN Nielsen & Associates (Paschen) to perform certain "green roof" work at the Southwest Area Middle School (Middle School) and Benito Juarez High School (High School) in Chicago, Illinois. The Public Building Commission of Chicago ordered the Middle School work; the Chicago Board of Education ordered the High School work. The "green roof" work at the Middle School includes installation of

<sup>&</sup>lt;sup>1</sup> All dates refer to 2009 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Narricot Industries, L.P. v. NLRB, F.3d, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted \_S.Ct.\_\_\_, 2009 WL 1468482 (U.S. Nov. 2, 2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

<sup>&</sup>lt;sup>3</sup> The plantsmen agreement covers employees in the following classifications: lead plantsmen, plantsmen, equipment mechanics, shop helpers, truck drivers, landscape helpers, water truck operators, and installers. The plantsmen agreement's scope of work includes "all work historically performed in the landscape construction industry at or on construction sites[.]" The Employer has approximately 15–18 employees covered by the plantsmen agreement.

<sup>&</sup>lt;sup>4</sup> The operators agreement covers employees working as landscape equipment operators. The operators agreement's scope of work includes the operation of equipment "on all commercial landscape construction projects," and specifically enumerates, inter alia, landscaping work performed on rooftops. The Employer has approximately three employees covered by the operators agreement.

a Green Grid modular system.<sup>5</sup> This involves placing preplanted modular trays on the roof of the building above the roof membrane. The "green roof" work at the High School includes installation of a built-up green roof system consisting of multiple layers or components that are installed on top of the roof membrane to create a rooftop garden. After framing the planting area with aluminum edging, the Employer places the following components above the roof membrane: a water retention mat, filter fabric, aggregate (i.e., loose gravel), growth medium (i.e., soil graded to the appropriate depth), and finally the plants. Under both of its subcontracts with Paschen, the Employer waters and otherwise maintains the plants before and during installation. The Employer also warrants the plants for 1 year after installation, meaning that its employees must return to the jobsites to water and otherwise maintain the plants during the warranty period, replacing them as necessary.

The Employer has historically performed green rooftop projects using its employees represented by Operating Engineers and Teamsters. Consistent with this practice, the Employer assigned the green roof installation work at both jobsites, as well as all other landscaping work under the Middle School subcontract, to these employees. The Employer has never assigned green roof work to employees represented by Roofers.

On June 16, Roofers initiated the procedures of the Joint Conference Board (JCB) to resolve an alleged jurisdictional dispute with respect to the performance of the green roofing work at the Middle School and High School jobsites. The JCB is established under the Standard Agreement between the Construction Employers' Association and the Chicago and Cook County Building and Construction Trades Council (CBTC). Roofers and Operating Engineers are members of the CBTC and are therefore signatories to the standard agreement. Teamsters is not a CBTC member and the Employer is not a member of the Construction Employers' Association. Accordingly, neither Teamsters nor the Employer is signatory to the standard agreement.

Roofers' initiation of JCB procedures culminated in JCB arbitration hearings involving Roofers and Operating Engineers. The Standard Agreement provides that an interested party present at a JCB hearing is deemed to accept the jurisdiction of the arbitrator and to be bound to the Standard Agreement for that case only. Neither Teamsters nor the Employer attended the JCB hearings.

There also exists a multi-project labor agreement (PLA) between the CBTC and the Chicago Board of

Education that incorporates the JCB procedure for resolving jurisdictional disputes. The PLA relevantly provides that "the parties to this Agreement, as well as each contractor and subcontractor performing work on or for the project, specifically are bound and stipulated to the jurisdiction and process of the Joint Conference Board." The High School project is subject to the PLA, which thereby binds the Employer to the jurisdiction and process of the JCB as to that project. Whether the PLA applies to the Middle School project is disputed. Operating Engineers and Roofers are signatories to the PLA; Teamsters is not.

Following Roofers' June 16 initiation of JCB procedures, Teamsters and Operating Engineers, in a letter to the Employer dated July 6, threatened to picket the Middle School and High School jobsites if the Employer reassigned any of the disputed work to members of Roofers.

## B. Work in Dispute

The work in dispute consists of certain green roof work to be performed by the Employer at the Middle School jobsite located at 3510 West 55th Street, and at the High School jobsite located at 2150 South Laflin Street, both in Chicago, Illinois. Specifically, the work in dispute at the Middle School consists of the placement of Green Grid preplanted vegetative modular trays and related components above the waterproofing membrane. The work in dispute at the High School consists of the installation of all layers in the built-up green roof system above the waterproofing membrane, up to and including the placement of the growth medium (i.e., soil). Roofers is not claiming any of the other work at either jobsite, including planting, watering and maintaining the plant materials at any time either before or during the 1-year warranty period. Neither is Roofers claiming any work after the placement of the soil at the High School jobsite, including the grading of the soil.

# C. Contentions of the Parties

Operating Engineers, Teamsters, and the Employer contend that (1) there are competing claims for the work in dispute; (2) there is reasonable cause to believe that Operating Engineers and Teamsters violated Section 8(b)(4)(D) by their threat to picket; (3) no voluntary method for dispute resolution exists to which all parties have agreed; and (4) the disputed work should be awarded to employees represented by Operating Engi-

<sup>&</sup>lt;sup>5</sup> The Green Grid system is a proprietary technology of ABC Supply Co., Inc., licensed to Weston Solutions, Inc.

<sup>&</sup>lt;sup>6</sup> Roofers contends that the PLA applies to the Middle School, while the Employer, Operating Engineers, and Teamsters contend that it does not so apply. The JCB arbitrator found that it does not. We need not and do not resolve this dispute because, as discussed in Part D, infra, Teamsters is not bound to the PLA under any circumstances.

neers and Teamsters based on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, relative skills, and gain or loss of employment.

Roofers moves to quash the notice of hearing primarily on the ground that the JCB procedure constitutes an agreed-upon voluntary means for adjusting the dispute binding on all of the parties. Roofers contends that it and Operating Engineers are bound to the JCB procedure as members of the CBTC, and the PLA, which incorporates the JCB procedure, applies to both the Middle School and High School jobsites and thus binds the Employer to the JCB procedure as to both "green roof" projects. Roofers further contends that as Teamsters is the joint representative of the Employer's employees together with Operating Engineers, Operating Engineers' assent to the JCB procedure binds Teamsters as well. In the alternative. Roofers contends that the notice of hearing still must be quashed because there are no competing claims to the work in dispute, and the threat to picket by Operating Engineers and Teamsters was a noncoercive sham. In the event that the Board does exercise its jurisdiction under Section 10(k) of the Act, Roofers contends that the Board should award the work in dispute to employees that it represents based on the factors of relative skills, economy and efficiency of operations, area practice, and prior jurisdictional dispute determinations.

# D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that there are competing claims to disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim. In addition, the Board must find that the parties have no agreed-upon method for voluntary adjustment of the dispute.<sup>7</sup> For the reasons stated below, we find that this dispute is properly before the Board for determination on the merits under Section 10(k).

First, although Roofers now contends that there are not competing claims to the disputed work, it joined the other parties in stipulating to the existence of competing claims. Besides, employees represented by Operating Engineers and Teamsters have been performing the work and expressly claimed the work by their joint letter of July 6, and Roofers made a competing claim by virtue of its efforts to secure an award of the disputed work

through the JCB grievance and arbitration proceedings. We find that there is reasonable cause to believe that there are competing claims to the disputed work.

Second, we find that there is reasonable cause to believe that Operating Engineers and Teamsters used means proscribed under Section 8(b)(4)(D) to enforce their claim. Their July 6 joint letter to the Employer, threatening it with picketing if it reassigned any of the disputed work to members of the Roofers, constitutes a threat to take proscribed coercive action in furtherance of a claim to the work in dispute. Although Roofers urges the Board to find that this threat was a sham, there is no evidence that the threat was not made seriously or that Teamsters and Operating Engineers colluded with the Employer in this matter. In fact, record testimony established that Paschen twice delayed all roof work at the Middle School in response to the picketing threat. Moreover, the Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause. 10

Finally, we find that there is no method for voluntary adjustment of the dispute to which all parties have agreed. It is settled that the Board will not hear a dispute when all of the parties are bound to an alternative method of adjustment. 11 Roofers contends that all parties are bound to the JCB procedure for resolving jurisdictional disputes. It concedes, however, that the sole basis for finding Teamsters bound to the JCB procedure is Teamsters' joint-representative status with Operating Engineers. Roofers argues that because of that jointrepresentative relationship, Operating Engineers' assent to the JCB procedure (by virtue of its being signatory to the PLA) binds Teamsters as well. In support, Roofers cites cases in which the act of one joint-representative union was held binding on the other; 12 but none of the cited cases is on point.

<sup>&</sup>lt;sup>7</sup> Bricklayers (Cretex Construction Services), 343 NLRB 1030, 1031 fn. 2 (2004).

<sup>&</sup>lt;sup>8</sup> See *Operating Engineers Local 150 (Moore Landscapes)*, 354 NLRB No. 89, slip op. at 3 (2009).

<sup>&</sup>lt;sup>9</sup> See Lancaster Typographical Union 70 (C.J.S. Lancaster), 325 NLRB 449, 450–451 (1998) ("It is well established that as long as a Union's statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe that the statute has been violated, in the absence of affirmative evidence that the threat was a sham or was the product of collusion.").

<sup>&</sup>lt;sup>10</sup> Id. at 451 ("The existence of a no-strike clause in a union's collective-bargaining agreement does not provide a basis for finding that a threat by that union is a sham.").

<sup>&</sup>lt;sup>11</sup> Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1140 (2005); Operating Engineers Local 150, AFL–CIO (Nickelson Industrial Service), 342 NLRB 954, 955 (2004) (holding that "in order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement").

<sup>&</sup>lt;sup>12</sup> Adobe Walls, 305 NLRB 25, 27 (1991), enfd. mem. 19 F.3d 1433 (6th Cir. 1994); *Pharmaseal Laboratories*, 199 NLRB 324, 325 (1972); see also *Electrical Workers IUE (Spartus Corp.)*, 271 NLRB 607

For example, the most nearly apposite case, Pharmaseal, supra, is still far afield. In Pharmaseal, the Board based its holding on evidence that the jointrepresentative unions had engaged in a course of conduct establishing that one of them had authority to bind both, and that the employer was led to believe that this was so. Here, Roofers makes no claim that Teamsters and Operating Engineers engaged in a course of conduct establishing that Operating Engineers had authority to bind the Teamsters to the PLA. Rather, Roofers rests its contention solely and entirely on Teamsters' and Operating Engineers' status as joint representative of employees covered by the Plantsmen Agreement. Roofers cites no authority, and we have found none, under which that fact alone would suffice. Moreover, Roofers took action inconsistent with its contention here. As the Employer points out, it attempted to have Teamsters removed from the Middle School and High School jobsites because Teamsters is not bound to the PLA. Consequently, we conclude that because Teamsters is bound to neither the Standard Agreement nor the PLA, all parties to the instant dispute have not agreed to abide by the JCB procedure. Accordingly, we proceed to the merits of the dispute.

# E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors in light of the Board's "[e]xperience and common sense." NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573, 583 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. Machinists Lodge 1743 (J.A. Jones Construction), 135 NLRB 1402, 1410–1411 (1962). Based on the following factors, which we find are relevant to determining this dispute, we conclude that the Employer's employees represented by Operating Engineers and Teamsters are entitled to perform the work in dispute.

# 1. Certifications and collective-bargaining agreements

The Board has exclusively certified Operating Engineers and Teamsters jointly as the representative of the Employer's employees in classifications performing the work in dispute. In addition, the Plantsmen Agreement and Operators Agreement, to which the Employer is bound through its membership in the ILCBA, at least generally cover the work in dispute as well as all em-

(1984) (service of charge on one joint-representative union held sufficient for service of charge on the other).

ployees performing that work.<sup>13</sup> By contrast, the Employer has never had a collective-bargaining relationship with Roofers. Accordingly, we find that the factor of Board certification and collective-bargaining agreements favors awarding the disputed work to employees represented by Operating Engineers and Teamsters.

### 2. Employer preference and past practice

The Employer has assigned all of the disputed work to its employees represented by Operating Engineers and Teamsters and prefers that they continue to perform it. Moreover, the Employer has used employees represented by Operating Engineers and Teamsters for green roof work since it began performing this work. The Employer has never assigned Roofers any green roof work. Accordingly, we find that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Operating Engineers and Teamsters.

# 3. Area and industry practice

Green roof landscaping has been routinely assigned to employees represented by Operating Engineers and Teamsters since at least 1995, and these two unions have jointly represented landscapers employed by ILCBAmember employers since 2004. The Employer presented evidence showing that Illinois Landscape Contractors Association members have assigned at least 119 rooftop landscaping projects to employees represented by Operating Engineers and Teamsters since 2002. Although Roofers claims that roofing contractors have been installing garden or green rooftop systems longer than landscape contractors have been, its evidence did not specify whether the work done by the roofing contractors was actually performed by employees represented by Roofers, or that the work performed was actually of the same type as the work in dispute here, i.e., vegetative roofs. Roofers also presented evidence of several vegetative roof installations that its members completed in the past 2 years, including a 500,000-square-foot project at McCormick Place in Chicago. Roofers makes much of this square footage; however, it is insufficient to overcome the extensive showing of Operating Engineers' and Teamsters' area and industry practice of installing vegetative green roof systems. Thus, this factor weighs in favor of awarding the work in dispute to employees represented by Operating Engineers and Teamsters. 14

<sup>&</sup>lt;sup>13</sup> The operators agreement specifically mentions green roof work in its scope of work; and while the current plantsmen agreement does not do likewise, the parties to it have always interpreted its general scope of work provisions as encompassing green roof work.

<sup>&</sup>lt;sup>14</sup> See *Moore Landscapes*, supra, slip op. at 5.

### 4. Relative skills

The Employer, Operating Engineers, and Teamsters presented evidence showing that their employees/members receive on-the-job and classroom training, attend OSHA training courses, participate in "toolbox safety meetings" at worksites, and have prior experience performing green roof work. In addition, the Employer introduced unrebutted testimony stating that ground- and roof-level landscaping is essentially the same type of work, performed at different elevations. Record testimony also supports the lack of a need for roofing skills to perform green roof work, as such work involves no tampering with or altering of the roof surface itself. 15 All green roof work, including the disputed work, occurs above the roof membrane. Stressing that work on rooftops is highly dangerous, Roofers testified that its members go through an intensive 5-year apprenticeship program to perform work on roofs, including the installation of roof systems that will be used for rooftop gardens. On this record, we find that employees represented by each of the three unions have the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award of the disputed work to either group of employees.

# 5. Economy and efficiency of operations

Record evidence shows that using employees represented by Operating Engineers and Teamsters instead of Roofers will prevent idle time since these employees have the skills and experience required to perform all aspects of the work under the Middle School and High School subcontracts. Assigning the disputed work to employees represented by Roofers will result in idle time while the Employer's employees wait for employees represented by Roofers to perform their discrete and limited portion of the subcontracted work. Moreover, the Employer's employees also perform the preparatory and post-installation work, such as plant care, watering, and soil grading, all work that Roofers does not claim. Further increasing the efficiency of the existing arrangement, the Employer's equipment operators double as plantsmen when there are no tasks requiring landscape equipment operation. We therefore find that the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Operating Engineers and Teamsters.

# 6. Prior jurisdictional dispute determinations

Roofers contends that prior jurisdictional dispute determinations indicate that an award of the work in the instant case should be made to employees that it represents. Roofers points out that it has been awarded the installation of preplanted roof trays in the past in arbitrations pursuant to the JCB procedure. However, these determinations did not involve the Employer or Teamsters. Additionally, arbitrators' jurisdictional dispute decisions do not bind the Board, as a contrary Section 10(k) Board award of work will supersede an arbitrator's decision. Thus, we find that this factor does not favor an award of the disputed work to either group of employees.

### Conclusion

After considering all of the relevant factors, we conclude that employees represented by the Operating Engineers and Teamsters are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Operating Engineers and Teamsters, and not to those unions or its members. The determination is limited to the controversy that gave rise to this proceeding.

# DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Paul F. Pedersen Company d/b/a Pedersen Company, represented by International Union of Operating Engineers, Local 150, and International Brotherhood of Teamsters, Local 703, are entitled to perform all of the work in dispute at the Southwest Area Middle School and Benito Juarez High School jobsites in Chicago, Illinois.

Dated, Washington, D.C. November 27, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>&</sup>lt;sup>15</sup> Roofers attaches great significance to the Employer's lack of a roofing license. However, the disputed work is of a landscaping and not a roofing nature.

<sup>&</sup>lt;sup>16</sup> Miron Construction Co. v Operating Engineers Local 139, 44 F.3d 558, 564 (7th Cir. 1995).